

In the Indiana Supreme Court



STATE OF INDIANA <i>ex rel.</i>)	Supreme Court No.
BLUE DIAMOND REVOCABLE)	49S00-1308-OR-577
TRUST, Trustees Nancy A. DAW and)	
Stephen L. HOBACK,)	
Relators,)	
)	
v.)	
)	
MARION SUPERIOR COURT, CIVIL)	
DIVISION 3, and THE HON. PATRICK)	
L. McCARTY, as Judge Thereof,)	Trial Court No.
Respondents.)	49D03-1305-PL-022339

ORDER

The Relators Nancy A. Daw and Stephen L. Hoback are co-trustees of the Blue Diamond Revocable Trust ("Trust"). The Relators filed a petition for a writ of mandamus and prohibition, seeking relief under the Rules of Procedure for Original Actions. They allege that the Respondents (the Marion Superior Court, Civil Division 3, and the Hon. Patrick L. McCarty, as Judge thereof) have failed to act when under a duty to act by not granting the Trust's motion for change of judge and that the Respondents have exceeded their jurisdiction by striking that motion. No briefs opposing the petition were filed.

Each member of the Court has had an opportunity to review and consider the materials filed in this original action and to discuss this matter with other Justices. Each Justice has voted to deny the writ. The Court denies the writ for the following reasons.

The writ of mandamus is an extraordinary remedy, equitable in nature and viewed with disfavor. State ex rel. Woodford v. Marion Super. Ct., 655 N.E.2d 63, 65 (Ind. 1995). Writs of mandamus will not issue unless the relator has a clear and unquestioned right to relief and the respondent court has failed to perform a clear, absolute, and imperative duty imposed by law. Id. Similarly, a writ of prohibition will be issued only

where the trial court has an absolute duty to act or refrain from acting. Id. at 66. A corollary to these rules is that an action for mandamus cannot be employed to adjudicate and establish a right or to define and impose a duty. State ex rel. Fadell v. Porter Super. Ct., 475 N.E.2d 310, 312 (Ind. 1985); State ex rel. Drost v. Newton Super. Ct., 275 Ind. 297, 416 N.E.2d 1247, 1250 (1981).

“In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor *by a party or his attorney.*” Ind. Trial Rule 76(B) (emphasis added). The Relators identify the defendants in the condemnation case below as (1) the Trust; (2) Ms. Daw “as an Individual”; and (3) Mr. Hoback “as an Individual[.]” (Petition (“Pet.”) at 3.) The condemnation complaint alleges that Ms. Daw and Mr. Hoback are “[l]ife [e]state holder[s]” of the property at issue. (Record (“R.”) at 3.)

The motion for change of judge states, “The Defendant, the Blue Diamond Revocable Trust by *Pro Se* and Trustees, Nancy A. Daw and Stephen L. Hoback pursuant to Trial Rule 76(B) ... does now file an unverified application and MOTION FOR A CHANGE OF JUDGE[.]” (R. at 31, 36.) The Relators have insisted they have the right to represent the Trust in filing its motion for change of judge. The trial court struck that motion on grounds “1. [t]hat Nancy A. Daw and Stephen L. Hoback are not licensed to practice law in this or another state; 2. [t]hat the trust cannot represent itself; [and] 3. [t]hat being a Trustee of a trust does not mean that the Trustee can be a legal representative of the trust in the role of an attorney.” (R. at 182.)

Other courts have held a non-attorney trustee, like the Relators here, may not represent the trust in court. See Knoefler v. United Bank of Bismark, 20 F.3d 347, 348 (8th Cir. 1994) (“A nonlawyer, such as these purported ‘trustee(s) pro se,’ has no right to represent another entity, i.e., a trust, in a court of the United States.”), *reh’g and suggestion for reh’g en banc denied*; Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 215 P.3d 457, 465 (2009) (“By representing the trust *pro se*, the trustee would be representing the interests of others, i.e., the beneficiaries, and would therefore be engaged in the unauthorized practice of law.”), *reh’g denied, cert. denied*,

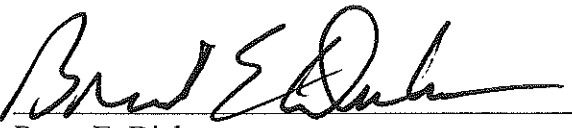
559 U.S. 944 (2010); Bank of New York v. Miller, 185 Ohio App. 3d 163, 923 N.E.2d 651, 652 (2009) (“A trustee of a trust, who is not a licensed and registered attorney at law, may not file pleadings, argue, or otherwise represent the trust as counsel in court.”); In re Guetersloh, 326 S.W.3d 737, 739-740 (Tex. App. 2010) (noting Texas law defines “trust” as a fiduciary relationship governing the trustee with respect to the trust property and “if a non-attorney trustee appears in court on behalf of the trust, he or she necessarily represents the interests of others [i.e., trust beneficiaries], which amounts to unauthorized practice of law.”), *reh’g overruled*. The Relators cite no Indiana case law to the contrary.

The Relators also contend they are the Trust’s beneficiaries and should be allowed, in effect, to represent their own interests. However, the record filed by the Relators contains no information supporting this contention.

In sum, the Relators fail to show they have a clear, absolute right to represent the Trust and move for a change of judge on its behalf, and they may not use this original action to establish such a right. See Fadell, 475 N.E.2d at 312. Accordingly, the Court DENIES the petition for writ of mandamus and prohibition. Motions to reconsider or petitions for rehearing are not allowed. Ind. Original Action Rule 5(C).

The Clerk is directed to post a copy of this order to the Court’s website and to send copies of this order to the Hon. Patrick L. McCarty, Marion Superior Court, Civil Division 3; Alex Beatty and David J. Lichtenberger, Office of Corporation Counsel, 200 E. Washington Street, Suite 1601, Indianapolis, IN 46204; and Blue Diamond Revocable Trust, Trustees Nancy A. Daw and Stephen L. Hoback, 4110 Ritterskamp Ct., Indianapolis, IN 46250-2271.

Done at Indianapolis, Indiana, on November 1, 2013.


Brent E. Dickson
Chief Justice of Indiana

All Justices concur.